

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

27274

**FILE:** B-212015.2

**DATE:** January 24, 1984

**MATTER OF:** H. E. Cramer Company, Inc.

**DIGEST:**

1. Under GAO's Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), alleged improprieties in negotiated procurements which do not exist in the initial solicitation, but which are subsequently incorporated therein must be protested no later than the next closing date for receipt of proposals following the incorporation. Protester's objection to the contracting agency's treatment of travel costs in an amendment to the solicitation raised for first time in the protester's October 31, 1983, comments on the agency's protest reports is untimely since closing date set by the amendment calling for revised cost proposals was July 18, 1983.
2. The protester has the burden of affirmatively proving its case. GAO finds that the protester has furnished no evidence to show that contracting agency's evaluation of the technical proposals was unreasonable or contrary to the solicitation's evaluation criteria. GAO also finds that the protester has failed to establish any prejudice to it from delays that occurred during the course of the protested procurement or that any offeror's offer was revealed to another offeror during the procurement.

H. E. Cramer Company, Inc. (Cramer), protests the award of a contract to any company other than Cramer under request for proposals (RFP) DAAD09-82-R-0021 issued by the United States Army Dugway Proving Ground, Dugway, Utah. The RFP calls for a fixed-price level of effort, requirement-type contract for state-of-the-art atmospheric transport and dispersion modeling techniques to aid Dugway Proving Ground's testing and study efforts in this area. No award has been made.

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Cramer contends that the administrative time that has occurred in the handling of the protested procurement has given offerors "too many bites of the apple" which, in turn, has "compromised" the offers that have been submitted. Cramer also contends that the Army's treatment of travel costs without full negotiations with offerors has resulted in a cost evaluation of the submitted proposals that does not give the government the lowest cost.

For the reasons set forth below, we dismiss Cramer's protest in part and deny it in part.

The RFP provides that the successful offeror will assist the Dugway Proving Ground personnel in improving and developing state-of-the-art transport and dispersion methodology. This is to be done through the design and evaluation of tests involving the open air release of a variety of chemical materials as well as through the conduct of a variety of studies involving the application of transport and dispersion theory to specific, assigned problems in the areas of air pollution hazards, weapons systems evaluations, and instrumentation assessments. The RFP further provides that the successful offeror have a certain number of scientists on its technical staff and that these scientists possess specific academic credentials. Finally, the RFP states that the successful offeror will prepare a management plan and visit Dugway Proving Ground up to 10 man days per month to observe testing efforts.

Under section "M" of the RFP proposals were to be evaluated to determine compliance with all requirements of the solicitation and award is to be made on the basis of lowest overall negotiated price of the proposal determined to be technically acceptable. On the September 20, 1983, closing date for the receipt of initial proposals, seven offers were received. Following evaluation, Cramer was found to be technically acceptable and five other offers were found susceptible to being made technically acceptable. On December 15, 1982, the latter five offerors were notified of their technical deficiencies and given an opportunity to provide clarification or additional technical information. The final technical determinations on the offeror's proposals were completed on February 17, 1983, with four of these offerors' proposals being found technically acceptable.

A price analysis and negotiation plan was begun by the Army on February 22, 1983, and completed on March 24, 1983. Beginning on March 25, 1983, oral price negotiations were conducted with Cramer and the four other technically

acceptable offerors. Best and final cost offers were received from all technically acceptable offerors on the April 11, 1983, cutoff date.

Cost offers were evaluated by the contracting personnel at Dugway Proving Ground and a contract award package for award to a contractor located on the east coast was forwarded on April 21, 1983, to the Army's Test and Evaluation Command's Senior Review Board for approval. The Senior Review Board, however, disapproved of Dugway Proving Ground's evaluation of costs in the area of travel. While the RFP called for a fixed-price contract for the required work, the solicitation's price schedule provided that direct charges for travel were to be paid on a cost-reimbursable basis without profit or fee. The RFP's price schedule estimated travel costs at \$82,000 and stated that, for evaluation purposes, this \$82,000 figure would be added to the offerors' proposed level of effort prices for the contract work. However, the Senior Review Board noted that because Cramer was a local contractor, the company was offering "free travel" to Dugway Proving Ground.

On May 10, 1983, the Senior Review Board directed that the RFP be amended and cost discussions reopened with the five technically acceptable offerors. Following preparation and final approval by the Army's Test and Evaluation Command, Dugway Proving Ground issued on June 21, 1983, amendment 003 to the RFP, a revised pricing schedule. The amendment estimated that the portion of travel involving contractor destinations within the continental United States was \$10,800 and stated that this figure would be added to the offerors' proposed prices for evaluation purposes. As to travel to Dugway Proving Ground itself, amendment 003 specified that the offerors were to propose a fixed unit price for each trip to Dugway Proving Ground. The amendment further specified that each offeror's proposed unit price was to be multiplied by an estimated 84 trips to arrive at a total evaluated price for travel to Dugway Proving Ground. The amendment required offerors to respond to the revised pricing schedule by July 18, 1983.

On July 18, 1983, second best and final cost offers were received from all the technically acceptable offerors. After a short review, Dugway Proving Ground decided that further cost discussions were unnecessary and the procuring activity proceeded to evaluate the second best and final offers. The determination to award to the east coast contractor was again forwarded to the Test and Evaluation Command for approval and approval was granted on August 10, 1983.

By letter dated August 3, 1983, and received by this Office on August 9, 1983, Cramer protested Dugway Proving Ground's conduct of the procurement under the RFP.

Cramer asserts that the above-described sequence of events in the procurement clearly shows that there were excessive administrative time delays by the government. Cramer further asserts that much of the delay was caused by improper changes in the contracting officer's instructions to the technical evaluation committee. In this regard, Cramer alleges that the final instructions of the contracting officer to the technical evaluation committee were that a susceptible offeror's proposal was to be rated technically unacceptable only if the committee found that the offeror could not perform the work. According to Cramer, the net effect of the alleged changes in technical instructions was to preclude any consideration in the award process of the relative technical and performance capabilities of the offerors.

With respect to the Army's evaluation of the cost proposals, Cramer alleges that the contracting officer indicated that there would be further discussions of cost offers submitted in response to amendment 003 to the RFP. Cramer also contends that there should not have been any confusion over Cramer's treatment of travel costs. Cramer emphasizes that it specifically stated in the transmittal letter with its original cost proposal that company travel to Dugway Proving Ground was included in its proposed level of effort price. In this regard, Cramer argues that the "bottom line" of each offeror's cost offer is the total price that each offer specifies at the bottom of the RFP's pricing schedule. Consequently, Cramer takes the position that the Army could have eliminated all the administrative time and cost of obtaining second best and final cost offers by determining the lowest cost proposal based upon the first best and final cost offers.

Cramer also charges that the offers were compromised during the period for submission of second best and final offers. In specific, Cramer alleges that during this period the east coast offeror substantially lowered its prices because it had knowledge of the cost to beat in order to gain the award. Otherwise, Cramer claims, the effect of amendment 003 to the RFP should have been an increase in the total contract costs for all offerors.

The Army asserts that the administrative time expended in securing a technically acceptable award at the lowest cost to the government is not excessive considering the complexity of the RFP requirements, the number of proposals received, and the problems encountered in determining the low contract price. The Army further asserts that other than Cramer's allegations concerning the second best and final cost offers, Cramer has not demonstrated how it or any other offer was prejudiced by the government's conduct of the procurement.

With regard to the evaluation of the offerors' cost proposals, the Army states that amendment 003 was primarily issued in order to allow the Army to consider, for purposes of making an award at the lowest cost to the government, Cramer's no cost travel to Dugway Proving Ground. Rather than having travel costs payable on a cost reimbursable basis as originally provided for by the RFP, Cramer and the other technically acceptable offerors were instead given the opportunity to specify a fixed unit price per trip to the installation. The Army emphasizes that the actual contract cost to the government would be significantly lower if award went to a local contractor such as Cramer because little or no travel costs to Dugway would be incurred. Finally, the Army states that although additional discussions of the cost offers submitted in response to amendment 003 were planned, the adequacy of the offers responses to the amendment made such discussions unnecessary.

As to Cramer's allegation that offers were compromised during the period for submission of second best and final offers, the Army takes the position that the competitive system was not compromised. In this regard, the Army asserts that the contractor located on the east coast realized Cramer's advantage as a local contractor in offering travel costs and decreased its proposed level of effort price to perform the required contract work. In any event, the Army insists that offers were in no way compromised by any of the events that occurred in the procurement. The Army further emphasizes that all cost information of each offeror was and still is "for official use only."

We find Cramer's protest over the Army's treatment of travel costs to be untimely filed. Essentially, Cramer is challenging the propriety of the Army's issuance of amendment 003 to the RFP. As noted above, amendment 003 required a response from the offerors by July 18, 1983. Under our Bid Protest Procedures, alleged solicitation improprieties in negotiated procurements which do not exist in the initial solicitation, but which are subsequently incorporated

therein must be protested no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(b)(1) (1983). Cramer did not challenge issuance of amendment 003 until it submitted its comments to the Army's protest report on October 31, 1983.

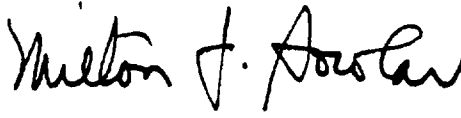
Turning to Cramer's charge that the Army's repricing of travel costs to Dugway Proving Ground was made without any discussions with the offerors, we see nothing unreasonable in the Army's determination that the adequacy of the offerors' responses to amendment 003 precluded the necessity of having further discussions. We have held the submission by offerors of revisions to their offers in response to a solicitation amendment in itself constitutes discussions with offerors. See National Veterans Law Center, 60 Comp. Gen. 223 (1981), 81-1 CPD 58. The test of whether discussions have occurred is whether offerors have been afforded an opportunity to revise or modify their proposals. National Veterans Law Center, supra.

With regard to Cramer's contention that changes in the technical evaluation process improperly leveled the relative technical and performance capabilities of the offerors, the protester has the burden of affirmatively proving its case. Information Network Systems, B-208009, March 17, 1983, 83-1 CPD 272. Also, we have repeatedly held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and that this will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10. The RFP provided that technical proposals were only to be evaluated for their acceptability in complying with all the requirements of the solicitation. Cramer has not specified what the changes in evaluation instructions allegedly were. Nor does Cramer specify the technical and performance capabilities of it or the offerors that were allegedly precluded from consideration. Since Cramer has failed to present any details, we must regard Cramer's arguments concerning the reasonableness of the Army's evaluation of the technical proposals as mere speculation.

We also agree with the Army that Cramer has not alleged how it was prejudiced by the time extensions that occurred during the course of this procurement. We find that the only allegation of prejudice that Cramer has made is that offers were compromised during the time for submission of second best and final offers under amendment 003. As to this allegation, the Army has emphasized that all cost

information furnished by each offeror was kept in the strictest confidence. Although Cramer feels that the net effect of amendment 003 should have been an overall increase in a nonlocal contractor's evaluated price, we find that Cramer has provided no tangible proof that proposed awardee had learned of Cramer's proposed contract prices.

We dismiss Cramer's protest in part and deny it in part.

*for*   
Comptroller General  
of the United States